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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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December 6, 1973

Keco Industries, Incorporated CNG00051
2438 Beekman Street
Cincinnati, Ohio 45214

Attention: Mr. Robert G. Adair
President

Gentlemen:

This refers to your letter of October 5, 1973, and prior correspondence, concerning the award of a contract to the Trane Company under invitation for bids (IFB) No. DSA-400-73-B-4807, as amended, issued on December 27, 1972, by the Defense Supply Agency (DSA), Directorate of Procurement and Production, Richmond, Virginia, for a quantity of air conditioners for the United States Marine Corps (the requiring activity). For the reasons stated below your protest is denied. AGR00107

Your protest concerns items 9 and 10, for air conditioners identified as A/E-20-18, and items 14 and 15 for air conditioners identified as A/E-32C-25. There was a first article test requirement for each of these four items. However, clause C46 of the solicitation provided in pertinent part as follows:

"C46 WAIVER OF FIRST ARTICLE APPROVAL TESTS (Decrease in Price) (Separate Line Item) The Government reserves the right to waive the requirement herein for first article approval tests as to those offerors offering a product which has been previously furnished by the offeror and has been accepted by the Government. Offerors offering such products, who wish to rely on such prior acceptance by the Government, must furnish evidence with the offer that prior Government acceptance is presently appropriate for the products to be furnished hereunder by indicating below contract numbers of identical or similar supplies accepted by the Government. When the Government decides to exercise its right to waive first article approval testing, offers will be evaluated on the basis of the decreased cost to the Government."

[Protest Against Award for Air Conditioners]

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Spaces were provided for bidders to indicate the contracts under which there had been prior Government acceptance of their product.

Bids were opened on April 24, 1973, and three bids were received. Trane's bid listed prior contracts for the A/E-32C-18 and A/E-32C-25 as a basis for waiving the first article test requirement for evaluation purposes. By telegram of May 7, 1973, the contracting officer forwarded Trane's request for waiver based on the contracts listed in its bid to the Marine Corps. By telegram dated June 6, 1973, the requiring activity approved waiver for Trane for all four items based on the prior contracts cited in the bid.

Your bid listed the following contracts as the basis for waiving the first article test requirements for your firm:

<u>Item No.</u>	<u>Air Conditioner</u>	<u>Contract No.</u>	<u>Date</u>
9 and 10	A/E-32C-18 DGSC	DSA 400-71-C-3094	1/15/71
11 and 12	A/E-32C-24 DGSC	DSA 400-71-C-3094	1/15/71
14 and 15	A/E-32C-25 SAAWA	F41508-71-C-6245	2/26/71
1 - 8	A/E-32C-17 DGSC	DSA 400-70-C-5141	5/7/70

The contract cited for the A/E-32C-25 air conditioner was an Air Force contract. The other contracts on the list are prior Marine Corps' contracts.

By letter of May 8, 1973, the contracting officer forwarded your request for waiver of first article testing based on the list in your bid to the Marine Corps for evaluation. On May 31, 1973, the Marine Corps advised the contracting officer that waiver of first article testing for the A/E-32C-25 air conditioner was not authorized for your concern since this air conditioner had not previously been furnished to the Marine Corps by Keco and first article testing of Keco's unit was desired. In that letter the Marine Corps also declined authorization for waiver of first article testing for the A/E-32C-17 and the A/E-32C-24, due to problems encountered under contracts Nos. DSA 400-71-C-3094 and DSA 400-71-C-5141.

Trane's bid was \$3,071 per unit for the 10 units under item 9 and the 10 units under item 10. The first article test cost in Trane's bid for these items was \$15,000. Your bid was \$3,200 per unit for the 10 units under item 9 and \$3,226 per unit for the 10 units under item 10. Your bid for the first article test cost for these items was \$7,500.

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An analysis of the prices for items 9 and 10 indicates that Trane's bid evaluated on the basis of waiver of first article testing was low whether or not your bid was also evaluated on the basis of waiver of first article testing.

The following is a comparison of the total amounts of Trane's bid and your bid for items 14 and 15:

	<u>Trane</u>	<u>Keco</u>
Item 14	\$30,042	\$27,642
Item 15	<u>50,070</u>	<u>46,490</u>
Total	\$80,112	\$74,132
First Article Testing	<u>15,000</u>	<u>7,500</u>
	\$95,112	\$81,632

An analysis of these prices indicates that Trane became the low bidder since its bid for items 14 and 15 was evaluated on the basis of waiver of first article testing whereas the first article testing costs were included in the evaluation of your bid.

On June 27, 1973, Trane was given notice of an award for all four items at a total award price of \$141,532, and the formal award documents were forwarded to Trane on July 13, 1973. On June 26, 1973, you were awarded all the remaining items and you were also awarded the total labor surplus area set-aside portion.

We have stated that the decision whether to grant a waiver of first article testing is a matter of administrative discretion and that we would not object to the exercise of the discretion in the absence of a clear showing of arbitrary or capricious action. B-177873, April 24, 1973, and B-175015(1), September 29, 1972, affirmed upon reconsideration, November 20, 1972.

The contracting officer's determination to evaluate Trane's bid on the basis of waiver of first article testing for items 9 and 10 is supported by the record, and you have not raised any questions regarding such waiver. Since Trane's bid as evaluated was low for those items whether or not your bid was evaluated on the basis of waiver of first article testing, it is not necessary to resolve whether first article testing should have been waived for your firm for those items.

You contend, however, that the award for items 14 and 15 to Trane is invalid since Trane was given preferential treatment in having its bid evaluated on the basis of waiver of first article testing, whereas such waiver was unjustifiably refused in the evaluation of your bid. In this connection, you dispute the Marine Corps' position that problems encountered under the contracts for the A/E-32C-17 and the A/E-32C-24 justified its refusal to waive first article testing for those items. Furthermore, you contend that since waiver should have been authorized for the A/E-32C-24, it follows that waiver should have been granted for the A/E-32C-25 because of the similarities between the units.

With respect to the A/E-32C-24, the Marine Corps has conceded that the problems encountered with that unit are minor and first article tests will be waived under the contract awarded to you for that model. Since a contract for the A/E-32C-24 was awarded to you under the subject solicitation, it is not material whether your bid for those items should have been evaluated on the basis of waiver of first article testing. With regard to the Marine Corps' rationale for not authorizing waiver of first article testing for the A/E-32C-25, in view of its decision to waive such requirement with respect to the A/E-32C-24, the Marine Corps answers as follows:

"2. The Marine Corps has received informal information that the Air Force required Reco Industries to perform only certain portions of the first article tests required by MIL-A-38339 and MIL-A-38346, on the - 25 air conditioners. The remainder of the test requirements were waived for reason of similarity to the A/E-32C-24 air conditioners.

"3. The Marine Corps recognizes the Air Force's prerogative to grant the above waiver for reason of similarity. However, this Headquarters cannot accept a similar position. The tactical environment under which the air conditioners are used is a primary consideration; Marine Corps' equipment must be capable of withstanding the following stresses: amphibious shipping; ship-to-shore movement in amphibious vehicles, landing craft, or helicopter; being carried in trucks or trailers over rough terrain in which no roads exist; and frequent and rapid movement. This contrasts significantly from the environment around a fixed or built-up area. Such areas are, by virtue of Service function, a logical site for Air Force

employment. Therefore, the Marine Corps considers the air conditioner's ability to pass shock and vibration tests to be valid.

"In regards to similarity between the A/E32C-24 and the A/E32C-25 air conditioners cited by reference (a) the following applies:

"1. The differences in weight between the A/E32C-24 (445 lbs) and the A/E32C-25 (435 lbs), can be a critical factor in the unit passing the requirements of MIL-A-38339, paragraph 4.6.4.1, 4.6.4.1.2, 4.6.1.3 and 4.6.4.5.

"2. MIL-A-38346 (A/E32C-25) paragraph 3.4.1 requires a minimum of 1,375 CFM of free-air delivery, and a minimum of 1,080 CFM against a static pressure of 1.0 inch of water. Whereas MIL-A-38345 (A/E32C-24), paragraph 3.4.1 requires a minimum of 1,290 CFM of free-air delivery and a minimum of 980 CFM against external static pressure of 1.0 inch of water.

"3. The requirements of MIL-A-38346 (A/E32C-25), paragraph 3.9 table I are considerably different than (sic) those of MIL-A-38345 (A/E32C-24) paragraph 3.9, table I.

As evidenced by enclosure (1), the manufacturer of the A/E32C-24 air conditioner (Contract DSA400-71-C-2034) experienced difficulty in passing the shock and vibration tests. Since these tests have never been made on the -25 air conditioners and the tactical considerations stated above, this headquarters considers that a potential problem exists. Therefore, the following first article tests are valid Marine Corps requirements.

"1. MIL-A-38339, paragraph 4.6.4, 4.6.6., 4.6.7.

"2. MIL-A-38346, paragraph 3.3.1, 3.4.1, 3.9."

The requirements of MIL-A-38339 and 38346, referred to above, involve vibration tests, resonance dwell, shock tests, noise level tests, tilted position tests, cooling capacity, and evaporator airflow.

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Enclosure 1 referred to in the above quotation is the preproduction test report on Keco's A/E-32C-24, furnished under contract No. DSA400-71-C-3094.

In your letter of September 18, 1973, you have asserted that Trane was relieved of the exact same testing requirements relating to shock, vibration and accelerated loading tests in qualifying its A/E-32C-25 under its prior contract. Consequently, you dispute that Trane's A/E-32C-25 had been put to any more stringent tests than your unit.

As a result of this assertion we requested DSA to furnish the technical basis for waiver of first article testing for Trane. DSA forwarded a telegram from the Marine Corps which stated as follows:

"This Headquarters recommended waiver of first article requirements for the Trane Company based upon previous performance under contract DSA-400-71-C-1418. Under the terms of that contract, the Trane Company conducted the full range of the environmental and mobility tests required of Marine Corps equipment. These tests were passed without incident."

The telegram reiterated that your firm had furnished the A/E-32C-25 to the Air Force but that the equipment was not tested to Marine Corps' requirements since the equipment was subjected only to limited environmental testing and no mobility or vibration testing.

A review of contract DSA-400-71-C-1418, cited above, indicates that while first article submission was waived, complete testing was required. This seems to support the Marine Corps' position that the full range of tests was conducted on Trane's A/E-32C-25 unit.

You also take the position that Keco's qualification of the A/E-32C-25 under contract No. F41608-71-C-6245, was not conditional in my respect and that since clause C46 refers to acceptance of the units by the "Government", this encompasses both the Marine Corps and the Air Force. Finally, you contend that the only reason that first article testing was not waived for your unit was because you had not previously furnished the unit to the Marine Corps.

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We agree that both the Marine Corps and the Air Force are included in the word "Government" as it is used in clause C46. However, since under the clause the Government "reserves" the right to waive first article testing, whether the agency of the Government concerned does so or not in a particular case is a matter of discretion. The Marine Corps' determination not to authorize waiver of first article testing for your firm for items 14 and 15 was not based on the fact that you had not previously supplied the A/E-32C-25 to the Marine Corps, as you contend. Rather, the record indicates the Marine Corps had certain reservations about authorizing waiver of first article testing for the A/E-32C-25 offered by your firm since all of the tests had not been performed on your unit, and while another Department had approved the unit based on tests that were performed on the A/E-32C-24, the Marine Corps did not believe that such approval was sufficient for its purposes. In these circumstances, we cannot say that there was an abuse of the administrative discretion in including the first article testing costs in evaluating your bid for items 14 and 15. Furthermore, since Trane had previously furnished an A/E-32C-25 unit to the Marine Corps and it had been fully tested, we cannot say that it was arbitrary or capricious to evaluate Trane's bid for items 14 and 15 on the basis of waiver of first article testing.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States